No. 58

In the Supreme Court of the United States

October Term, 1945

Joachim O. Fernandez, United States Collector of Internal Revenue, appellant

v.

Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener

Appeal from the District Court of the United States for the Eastern District of Louisiana

BRIEF FOR THE APPELLANT

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 12–19) which is reported in 60 F. Supp. 169.

JURISDICTION

The judgment of the District Court was entered on March 31, 1945, and the petition for appeal was filed and allowed by the District Court on the same date. (R. 19–21.) Probable jurisdic-

tion by this Court was noted on May 7, 1945. (R. 23.) The jurisdiction of this Court rests upon Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751.

QUESTION PRESENTED

Whether Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional.

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES INVOLVED

The constitutional provisions, federal statutes, and Treasury Regulations involved are set forth in Appendix A, *infra*, pp. 70–79. Excerpts from the relevant committee reports are set forth in Appendix B, *infra*, pp. 80–84.

Provisions of the Louisiana Civil Code relating to community property are set forth in Appendix C, *infra*, pp. 85–97.

STATEMENT

This is an action for the recovery of an alleged overpayment of federal estate taxes upon the estate of Sam Wiener, Jr. The facts were stipulated (R. 7–11), and were so found by the District Court (R. 12, 19). They may be summarized as follows:

The decedent was married in Shreveport, Louisiana, in 1907, to Florence Loeb, with whom he lived from that time until his death on December 10, 1942. The appellees are his children and sole heirs. (R. 7–8.) During the marriage the

decedent engaged in many different kinds of businesses, such as the grocery business, lumber business, real estate, and investments of various kinds. With the exception of certain realty in Mississippi, all assets which stood of record or in possession of the decedent at the time of his death were acquired by and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener. (R. 8.)

In the federal estate tax return there was reported only one-half of the net value of the community property. Included in the community and also reported to the extent of only one-half, were 15 policies of life insurance, all of which (a) were contracted for by decedent during the marriage; (b) named the wife as beneficiary, and (c) reserved the right to the insured of changing the beneficiary. All of the premiums on these policies had been paid for with community funds. (R. 8–9.)

The Commissioner of Internal Revenue determined a deficiency in estate tax on the ground that there should have been included in the gross

estate the entire value of all of the community property, including the total proceeds of the 15 life insurance policies. The deficiency was paid and following rejection of a claim for refund this action against the Collector was instituted. (R. 9–10.)

It is agreed that if it should be held that only half of the community property is taxable, the deductions should be adjusted so as to eliminate half of the community debts and expenses. (R. 10.)

The District Court held that the amendments made to Section 811 of the Internal Revenue Code by Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional (R. 12–19) and entered judgment for the plaintiffs (R. 19–20).

SPECIFICATION OF ERRORS TO BE URGED

The assignments of error appear at R. 21. They may be summarized by the statement that the court below erred in holding that Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional.

SUMMARY OF ARGUMENT

A. The statutory provisions here involved were enacted for the sole purposes of stopping a serious leak in the revenues and of eliminating an unfair discrimination in the practical operation of the estate tax. They are directed toward the solution of a federal tax problem, one which is clearly within the power of Congress to resolve.

B. The statute does not offend the Fifth Amendment. That provision of the Constitution operates as a limitation upon the taxing power only in the most exceptional circumstances, and then only where the statute is so completely arbitrary and capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. Congress can hardly be charged with having acted here out of caprice. However the interest of the decedent's wife in the community property prior to his death may be characterized, whether she be said to have had a "vested interest" in half, or to have been at all times the "owner" of half, the fact remains that upon his death her rights and powers with respect to that half were materially enlarged. An analysis of the local law with respect to the relative rights of the parties prior to the husband's death, makes clear that there was at that time a distinct shift to her of substantial rights and powers in the half which she is said to have always "owned".

It is not necessary to mark the outer limits of the Congressional power with respect to the application of the estate tax, for it is settled that such a shifting of economic interest as followed here from the death of the husband, constitutes ample justification for the inclusion in his gross estate of that half of the community property which went to his wife. *Whitney* v. *Tax Commission*, 309 U. S. 530, 539. It is not material

that under the local law the wife's interest is not regarded as passing to her by descent, for similar interests, which likewise are not regarded by the local law as passing by descent, have long been subject to the tax. The dower and courtesy interests, or any modern statutory substitutes therefor, of a surviving spouse are apt examples. There, as in the case of community property, the interest of the surviving spouse is usually deemed to have been "vested" as a result of the marriage and not to have been the subject of a transfer from the decedent to the survivor. Likewise the pre-existing interest of a surviving joint tenant or tenant by the entirety is includible in the gross estate of the deceased tenant, although that interest is not regarded by the local law as passing by descent. In all of these instances it has been held that there is no constitutional objection to the statute. *Tyler* v. *United States*, 281 U. S. 497; *United States* v. *Jacobs*, 306 U. S. 363. It was enough that death was the occasion for the shifting of substantial rights and powers with respect to those interests. That is also true here. Congress cannot therefore be said to have overstepped the bounds of reason in concluding that the changes in the wife's interest which followed the death of the decedent here are sufficiently similar to those which have long been the occasion for the tax to require, in the interests of uniform and equitable operation, that this situation be accorded similar treatment.

Indeed, this Court has already held that the shifting of economic interest resulting from the death of a spouse in a community property state furnishes ample occasion for the imposition of a death duty by a state and that such a tax does not violate the Fourteenth Amendment. *Moffitt v. Kelly,* 218 U. S. 400. *A fortiori* such a tax by the Federal Government does not violate the Fifth Amendment since the restraints imposed by that amendment upon the federal taxing power are not as great as those imposed upon the states by the Fourteenth. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584.

Any suggestion that the statute might be unconstitutional as applied to a case in which the wife predeceases the husband, is not properly before the Court because this is not such a case, but in any event it is plain that there is no greater constitutional objection to the operation of the statute in such cases than in the case in which the husband predeceases the wife.

There is no merit to the suggestion that it is not possible to show what portion of the community property is economically attributable to the surviving spouse and that the statute therefore creates an irrebuttable presumption that the whole estate was created by the spouse first to die. The burden is no different from that of showing what part of the property is separate as distinguished from community property or of showing what portion of the co-owned property was contributed

by the surviving spouse in the case of joint tenancies and tenancies by the entirety. Certainly, it cannot be assumed that the statute imposes an impossible burden. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337..

C. The statute does not violate the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution. That provision does not require that a tax be intrinsically equal in its operation throughout all of the states. It imposes a requirement merely of geographic uniformity. That test is obviously met by the statutory provisions here involved for they apply to community property interests wherever they may be found. There is no substantial basis for the suggestion that the community property states will be at a disadvantage with respect to the operation of the estate tax in comparison with the other states of the union. However, even if it should be assumed that such a disadvantage will ensue, that would afford no ground for a holding that the statute is in contravention of the uniformity clause, for such a disadvantage would be the result, not of the federal statute, but of differences in state laws. Cf. *Florida* v. *Mellon,* 273 U. S. 12.

D. The statute does not violate the Tenth Amendment. That amendment does not operate as a limitation against the powers, express or implied, of the National Government. *United States* v. *Darby,* 312 U. S. 100, 123–124. There has been no deliberate intrusion by Congress into a sphere

reserved for the states, or even an unintentional interference with the power of the states to regulate marital property rights. The statute does not undertake to alter the rights of husband and wife in the community property states nor does it proceed from a disregard of the existence of those rights. On the contrary the statute represents a confirmation of the power of the states to regulate marital property rights and of the rights of the spouses as the state has distributed them. It proceeds not from a disregard of those rights but from a regard of them, for the tax has been levied in recognition of the fact that they exist as the state has ordained. The intimation that the statute will necessarily force the community property states to abandon that system rests upon pure conjecture, and it cannot be assumed that such a result will follow. But even if it should, that would afford no ground for striking down the exercise of the federal power here, since the constitutional powers of the Federal Government are supreme.

ARGUMENT

SECTIONS 402 (b) (2) AND 404 (a) OF THE REVENUE ACT OF 1942 ARE CONSTITUTIONAL

A. SECTIONS 402 (b) (2) AND 404 (a) REPRESENT AN EXERCISE OF THE FEDERAL TAXING POWER IN THE SOLUTION OF A FEDERAL TAX PROBLEM

This case brings to the Court the question of the constitutional validity of the amendments

made to Section 811 of the Internal Revenue Code by Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 (Appendix A, *infra,* pp. 72–75). The question with respect to Section 402 (b) (2) was before the Court on review of the decision of the Supreme Court of Louisiana in *Succession of Wiener,* 203 La. 649 (involving the estate of the same decedent as is here involved), which was, however, disposed of on jurisdictional grounds. *Flournoy* v. *Wiener,* 321 U. S. 253.

As so amended the statute provides that for purposes of the estate tax there shall be included in a decedent's gross estate the full value of all property—

> To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Only the first sentence of this subsection is directly involved here. It requires the inclusion in

the gross estate of a decedent of the value of all property held in community except for that portion which represents earnings, or the increment from separate property, of the surviving spouse. The second sentence merely continues the preexisting law by providing that in any case there must be included in the gross estate the value of the property over which the decedent had power of testamentary disposition. In the instant case no part of the community property represented compensation received by the decedent's wife for personal services or the increment from her separate property, and as a consequence the statute requires the inclusion in the decedent's gross estate of the entire community property. It is this application of the section which is here said to be unconstitutional.

Also involved in the instant case are the amendments relating to the proceeds of life insurance made by Section 404 (a) of the Revenue Act of 1942 (Appendix A, *infra*, pp. 73–75). As so amended paragraph (2) of Section 811 (g) of the Internal Revenue Code requires the inclusion in the gross estate of the proceeds of policies of insurance on the decedent's life with respect to which he (a) had paid the premiums, or (b) possessed at the time of his death any of the incidents of ownership. Paragraph (4) provides that where premiums have been paid with community property, they shall be considered to have been paid by the insured except to the extent that

they represent earnings, or the increment from separate property, of the surviving spouse. The latter paragraph also defines the term "incidents of ownership" to include such incidents if possessed by the decedent at his death as manager of the community.

The challenge to the statute has proceeded upon a broad front. It is said to violate the Fifth and Tenth Amendments to the Constitution, to infringe the requirement of Article 1, Section 8, Clause 1, that duties, imposts and excises be uniform, and to impose a direct tax, void because not apportioned, within the meaning of Article 1, Section 2, Clause 3, and Article 1, Section 9, Clause 4 (Appendix A, *infra*).

Since the attack upon the statute is bottomed to a substantial degree upon the assertion that Congress has thereby sought to withdraw from control of the states their power to regulate the property incidents of the marital relationship, we think it important to make clear at the outset the nature of the problem with which Congress dealt and what it sought to achieve by the challenged enactment. The argument attributes to Congress a purpose to alter and regulate local systems of property rights and has even been carried to the point of alleging that what Congress really sought to achieve was to force the community property states to abandon that system.[1]

[1] See brief of Attorneys General of California, Arizona, Etc., in *Flournoy* v. *Wiener*, 321 U. S. 253, p. 5.

These contentions might well be answered shortly by simple reference to *Sonzinsky* v. *United States,* 300 U. S. 506. In that case the Court said that it was beyond its competency to inquire (pp. 513–514)—

> into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it * * *

and that it—

> will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.

But in any event the record is plain beyond question. Congress dealt only with a purely federal tax problem, a problem with which it has undoubted power to deal, and there is absolutely no basis for the implication of any hidden purpose to achieve some other end.

The history of the application of the estate tax in the community property states has been similar to that of the income tax. In *Poe* v. *Seaborn,* 282 U. S. 101, and its companion cases,[2] it was held as a matter of statutory construction that for purposes of the income tax, spouses in the eight

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[2] *Hopkins* v. *Bacon,* 282 U. S. 122; *Bender* v. *Pfaff,* 282 U. S. 127; *Goodell* v. *Koch,* 282 U. S. 118; *United States* v. *Malcolm,* 282 U. S. 792.

traditional community property states[8] could divide the community income between them in separate returns, achieving thereby a reduction in surtaxes. This conclusion was reached upon the ground that only one-half was income "of" each spouse within the meaning of the federal statute which levied the tax upon "the income of every individual". These holdings were regarded as requiring that for purposes of the estate tax only one-half of the community property could be treated as "the extent of the interest" of a decedent in such property within the meaning of what is now Section 811 (a) of the Internal Revenue Code (Appendix A, *infra*, p. 71). 1 Paul, Federal Estate and Gift Taxation, Sec. 1.09, p. 58; cf. *Lang* v. *Commissioner,* 304 U. S. 264.

The result has been the imposition of disproportionate and heavier burdens under both the income tax and the estate tax upon spouses in all of the other states of the Union. Since both of these taxes are progressively graduated in rates so as to distribute the burden in accordance with ability to pay, and should manifestly operate with substantial uniformity throughout the nation (cf. *United States* v. *Pelzer,* 312 U. S. 399, 402), the situation aroused widespread critical

[8] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The cases referred to, however, did not involve New Mexico, Idaho, or Nevada.

discussion.[4] And the matter has been the subject of close Congressional attention for many years and upon many occasions.[5]

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[4] E. g., see the dissenting opinion of Justices Douglas and Black in *Commissioner* v. *Harmon*, 323 U. S. 44, 49, and those by Haney, J., in *Black* v. *Commissioner*, 114 F. 2d 355, 360 (C. C. A. 9th), and *Commissioner* v. *Cadwallader*, 127 F. 2d 547, 550 (C. C. A. 9th). Paul, Studies in Federal Taxation (Second Series) 40–43; 1 Paul, Federal Estate and Gift Taxation, Sec. 1.09; Bruton, The Taxation of Family Income, 41 Yale L. J. 1172 (1932); Altman, Community Property: Avoiding Avoidance by Adoption in the Revenue Act, 16 Tax Magazine 138 (1938); Oliver, Community Property and the Taxation of Family Income, 20 Tex. L. Rev. 532 (1942); Lowndes, Community Income and Alimony, 20 Tax Magazine 3 (1942); Ray, Proposed Changes in Federal Taxation of Community Property, 30 Calif. L. Rev. 397, 527 (1942); Altman, Oklahoma Community Property Law, 22 Tax Magazine 260 (1944); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 827 (1943).

See also the material collected in fn. 5, *infra*.

[5] 1921: See H. Rep. No. 350, 67th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 168, 176); H. Conference Rep. No. 486, 67th Cong., 1st Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 206, 212); 61 Cong. Record, Part 6, pp. 5909, 5922; Part 7, p. 7229.

1924: Revenue Revision 1924, Hearings before the Committee on Ways and Means, 68th Cong., 1st Sess., pp. 194–197, 348–387, 478–485.

1933: Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. II, Part 2 (1933), pp. 15, 118–121, 139–140, 169.

1934: Hearings before a Subcommittee of the Committee on Ways and Means on H. R. 8396, 73d Cong., 2d Sess.; H. Rep. No. 704, Part 2, 73d Cong., 2d Sess., pp. 8–10.

1937: President's letter to Congress of June 1, 1937 (Hearings Before the Joint Committee on Tax Evasion and Avoid-

This was the chronic problem which Congress finally determined to meet, at least insofar as the estate and gift taxes were concerned.[8] The House Committee Report (H. Rep. No. 2333, 77th Cong., 1st Sess., pp. 35–37, 160 (1942–2 Cum. Bull. 372, 401) (Appendix B, *infra*, p. 80), pointed out (p. 35): "For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy preferential treatment over those living in non-community-property States." Tables were set forth in graphic illustration of the "enormous" differences in tax treatment in the typical situation in which the husband dies first, leaving property acquired through his efforts. The report continued (p. 37):

> Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law.

ance, 75th Cong., 1st Sess., Part 1, pp. 2, 5; see also, Part 2, p. 311).

1941: S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 9 (1941–2 Cum. Bull. 466, 474).

[8] Sections 402 and 404 of the Revenue Act of 1942 relate to the estate tax and Section 453 deals with the gift tax.

The Senate Report (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231–232) (1942–2 Cum. Bull. 504) (Appendix B, *infra*, p. 83), stated the same purpose as motivating the provision. It said (p. 231):

> This section, which corresponds to section 402 of the bill passed by the House, eliminates special estate tax privileges enjoyed by virtue of the community property system.

The record is clear. Congress exercised its power to tax for no reason other than those germane to problems of taxation. It sought (a) to stop a serious leak in the revenues and (b) by so doing to eliminate an inequity in the operation of the tax. There is no room for the imputation of an invidious purpose[7] to eliminate, by means of a tax, the community property system. As this Court said in *Patton* v. *Brady*, 184 U. S. 608, 620:

> There is in this legislation, if ever such a question could arise, no matter of color or pretence. There was an existing demand, and to meet that demand this statute was enacted.

When shorn of verbiage and technical elaboration the objections to the legislation all reduce to an assertion that the discrimination in favor of

[7] Nor is there any basis for the suggestion that the amendments will necessarily result in the abandonment of that system. See *infra*, pp. 62, 68–69.

the community property states is one which is required by the Constitution. We respectfully submit, however, that the Constituton does not leave Congress helpless to rectify such a situation.[8] Congress has undoubted power to levy an estate tax,[9] and has an equally plain power to eliminate inequities in its practical operation. Congress has considered the statute appropriate in the achievement of an end within its express constitutional authority. It seems that it can hardly be denied that there is a reasonable relationship between the legislation and the end which it is designed to promote. Therefore the Congressional decision that the statute is necessary and proper is not to be reexamined here. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Logan* v. *United States,* 144 U. S. 263; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447, 473–474.

B. THE FIFTH AMENDMENT

1. *The nature of the restraints upon the taxing power under the due process clause*

At the outset it should be pointed out that the presumption in favor of the validity of an Act

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[8] The objections made to the statute have not been confined to an attack upon the particular remedy chosen by Congress but assume a scope which denies to Congress any power to deal with the problem at all. See amicus curiae brief of Brady and others in *Flournoy* v. *Wiener*, pp. 53–54.

[9] *New York Trust Co.* v. *Eisner*, 256 U. S. 345; cf. *Scholey* v. *Rew*, 23 Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41.

of Congress is particularly strong with respect to revenue acts,[10] *Nicol* v. *Ames,* 173 U. S. 509, 515; *United States* v. *Jacobs,* 306 U. S. 363, 370. It is only in rare and exceptional circumstances that the due process clause of the Fifth Amendment operates as a limitation upon the taxing power (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44), and then only if the challenged statute be so arbitrary or capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90; *Nichols* v. *Coolidge,* 274 U. S. 531.

The contention that the 1942 amendments contravene the due process clause appears to be based primarily upon these premises: (a) It is asserted that under local law the wife was at all times the "owner" of one-half of the community property, and (b) it is contended that to measure the tax upon the husband's estate by that half amounts to taxing A on the property of B, which is said to violate the Fifth Amendment.

With respect to the suggestion that the wife of the decedent herein was at all times the "owner" of half of the community property, it may be conceded that the local law describes her as having a "vested interest" in half of the

[10] This fundamental tenet may well be emphasized since both the court below and the District Court in the companion case of *United States* v. *Rompel,* No. 59, seem to have overlooked it.

property,[11] although it may be noted that the Louisiana courts have not always so held. See *Guice* v. *Lawrence,* 2 La. Ann. 226, which was overruled in *Phillips* v. *Phillips,* 160 La. 813, 826–827; see also *Bender* v. *Pfaff,* 282 U. S. 127. The issue, however, does not turn upon such nomenclature.[12] Nor does it turn upon such a

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[11] Professor Daggett has said with respect to the wife's interest in Louisiana that: "the property appears to be vested for taxation purposes only; as neither the wife nor her creditors have any rights in it or against it during the existence of the community," and has characterized (p. 592) "adherence to the theory of the wife's vested interest" as amounting "to little more than lip-service." (Daggett, The Oklahoma Community Property Act, 2 La. L. Rev. 575, 585 (1940).)

See also Daggett, The Community Property System of Louisiana, 149–150.

With respect to the situation in the community property states generally, see 3 Vernier, American Family Laws 234–235:

"In certain isolated instances, as in respect to inheritance and income taxation, whether the wife has a vested interest or only an expectancy may be thought extremely important. But in the ordinary points of contact between the husband and wife and third parties it seems to make little difference. By and large, the husband exercises the rights of ownership. Whether he exercises those rights because he is owner, as in California, or because he is the statutory manager of the community, as in other jurisdictions, seems relatively unimportant. The wife finds herself with a "vested interest" in property which she cannot bind by contract, and which (except in Arizona and Washington) may be taken from her by the husband's separate creditors."

[12] *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110. See Altman, The Community Property Amendment to the Estate Tax Law, 21 Tax Magazine 643 (1943).

vague generality as "A's tax cannot be measured by the property of B", for the validity of that generality depends in each instance upon the content of the word "property" and the relationship to it of A and B.[13] Moreover, to the extent that *Hoeper* v. *Tax Commission*, 284 U. S. 206, supports the principle that A cannot be taxed on B's income (see fn. 13, *supra*), the principle is irrelevant here. That case dealt not with community or co-owned property, but with separate property of the wife; under the law of Wisconsin the wife exercised the same right of management and control with respect to her separate property as if she were single. The decision is no authority for holding that an estate tax may not be levied against A's estate on the basis of the full value of co-owned property if substantial rights and powers respecting the whole property accrue to B on A's death.

[13] See H. Rep. No. 1040, 77th Cong., 1st Sess., p. 20 (1941-2 Cum. Bull. 413):

"These cases conclusively demonstrate that the convenient phrase, 'A may not be taxed on B's' income, is by no means an all-pervasive formula which will assist in the solution of tax problems. On the contrary A may be taxed on B's income if there are sufficient justificatory facts. The inquiry does not cease with a determination that A is being taxed on income which he did not receive, but must be further pursued with a view to discovering whether there are sufficient facts to so justify taxing A. The *Wells*, *Clifford*, *Horst*, *Eubank*; *Hormel*, and *Schaffner* cases are examples of situations in which the Supreme Court has concluded that A could be so taxed."

The power of Congress with respect to the permissible tax base for purposes of estate taxation is not limited to property "owned" by the decedent at the time of his death. There need not be a transfer at death in the technical sense from the decedent to the survivor. Cf., e. g., *United States* v. *Wells,* 283 U. S. 102; *Helvering* v. *Bullard,* 303 U. S. 297. It is enough here that the death of the decedent was the occasion for the enlargement of his wife's rights and powers with respect to the half of the community property which is referred to as having been "owned"[14] by her. However her interest in that half may be described, whether she be called "owner" or be said to have had a "vested interest" therein, the fact remains that such changes did occur upon his death and that is sufficient to bring the case well within the scope of the Congressional power.[15]

2. *The wife's interest under Louisiana community property law*

Prior to the husband's death the wife's so-called "vested" right consists chiefly of her right

[14] Ownership "is only a bundle of rights and privileges invested with a single name". *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 581. "Large concepts like 'property' and 'ownership' call for close analysis, especially when tax legislation is under scrutiny." *Whitney* v. *Tax Commission,* 309 U. S. 530, 538. See also *Central Hanover Bank Co.* v. *Kelly,* 319 U. S. 94, 98.

[15] See Ray, Proposed Changes in Federal Taxation of Community Property: Estate and Gift Taxes, 30 Calif. L. Rev. 527, 534–537 (1942).

to receive one-half of any community property in existence at the dissolution of the community by death or by divorce (for whatever cause), subject to community obligations. Articles 2406, 2409–2413 of the Louisiana Civil Code, Appendix C, *infra*, pp. 94–96. This is a right, not in specific property, but in a residue. *Tomme* v. *Tomme*, 174 La. 123; *Kelly* v. *Kelly*, 131 La. 1024. The wife has no right during the existence of the community to enjoy or dispose of her half interest in the community property, and she cannot during the existence of the community, secure any definite part of it for her own unrestricted use and enjoyment.

The husband has the sole management of the property and income. Article 2404, Louisiana Civil Code, Appendix C, *infra*, pp. 93–94. He administers it as he pleases and may expend the funds to gratify any personal desire without liability to account to the wife for his administration. *McCaffrey* v. *Benson*, 40 La. Ann. 10; *Frierson* v. *Frierson*, 164 La. 687. We note that the court below refers to the husband as being merely (R. 16) a "managing partner" of a partnership, and characterizes his powers as being ones of "bare management." However, as applied to the marital relationship in Louisiana, this form of description is inaccurate if the words are understood to connote what they ordinarily mean. There is no prohibition against the use by the

"managing partner" of the funds in his charge for his own benefit; there is no liability for an accounting if he has done so; there is no power to terminate the agency at will; the other partner is under no personal liability for his acts.

The husband may alienate the community property (personal or real) without the wife's consent[16] unless title stands in her name alone, in which case she must consent in writing.[17] She may not, however, even where title to the property stands in her name, alienate it without his consent[18] or sue to recover it without his joinder.[19] Nor may she ordinarily incur any obligations on behalf of the community, even for necessaries unless the husband fails to supply them.[20] *Adams* v. *Golson,* 187 La. 363, 371; *D. H. Holmes Co.* v. *Morris,* 188 La. 431. The community property will be liable for her torts only if committed when she was both authorized to and was carrying on the business of the community, and for this purpose a very narrow view is taken of what con-

[16] Article 2404; see also Article 2334 (Appendix C, *infra,* p. 88); *Young* v. *Arkansas-Louisiana Gas Co.,* 184 La. 460; *Smith* v. *Routon,* 181 So. 684 (La. App.); *Burns* v. *DeBakey,* 186 So. 374 (La. App.).

[17] *Otwell* v. *Vaughan,* 186 La. 911.

[18] *Bywater* v. *Enderle,* 175 La. 1098. See also *Norman Mayer & Co.* v. *Montgomery,* 187 La. 374.

[19] *Howell* v. *Harris,* 18 So. 2d 668 (La. App.).

[20] He is, however, liable, as head and master of the community for her attorney's fees in a suit brought by her for separation from bed and board. *Gosserand* v. *Monteleone,* 159 La. 316; see also *Vicknair* v. *Terracina,* 168 La. 417; *Wilson* v. *Henderson,* 191 So. 602 (La. App.).

stitutes the business of the community. *Adams* v. *Golson, supra; Matulich* v. *Crockett,* 184 So. 748 (La. App.); *Wise* v. *Smith,* 186 So. 857 (La. App.).

The husband's obligations are as broad as his powers. He is alone liable for, and only he can be sued for, the community debts. *Scanlan* v. *Warwick,* 10 La. Ann. 30. And the community debts may be satisfied out of his separate property. *Hellberg* v. *Hyland,* 168 La. 493. The wife, however, is not personally liable for the community debts, and they may not be satisfied out of her separate property. *Succession of Clark,* 27 La. Ann. 269; *Winter* v. *Gani,* 199 So. 600 (La. App.).

The only substantial restriction upon the husband's complete dominion over the community property is in the matter of gifts. Except for the establishment of the children of the marriage, he may not give away community real property or the whole, or a quota, of the personal property (Article 2404). "Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons". *Id.*

The extent of the protection which these provisions accord the wife have been thus summarized in Daggett, The Community Property System of Louisiana (p. 24):

> The property *given away* (citing *Bister* v. *Menge,* 21 La. Ann. 216), may be at-

tacked directly by the wife and relief is not given in an action against the husband or his heirs as is the case when there is a fraudulent disposal.

Since, as we have seen, the husband may give away what he pleases of the movables by a particular title, this limitation, like so many others in the Code dealing with immovables has, particularly with the drift away from land investments, become after all, of rather small importance as a safeguard to the wife.

She is also given a right of action by Article 2404 if the husband has made a fraudulent disposition of the property "on her satisfactorily proving the fraud". However, as in the case of an unauthorized gift by the husband, she may have no relief against the fraud until the dissolution of the community. Daggett, The Community Property System of Louisiana, 25.

This does not mean that the husband's dominion is completely unrestricted. As has been pointed out, the wife has a remedy against his heirs if he deliberately defrauds her, and there are some limitations upon his power to dispose of the property by gift. The enrichment of his separate estate at the expense of the community may also lead to a reimbursement when the community is dissolved (Article 2408, Appendix C, *infra,* p. 95), although reimbursement is not for the funds thus expended but for enhancement in value of the

property (*Munchow* v. *Munchow,* 136 La. 753). Conversely, she may bind the community for necessaries if he fails to provide them, and the community will be liable for her torts if they fall within (whatever may ultimately be determined to constitute) the group of those committed while she was on authorized business of the community.

Several statements made by the Supreme Court of Louisiana in *Flourney* v. *Wiener, supra,* with respect to the relationship of the spouses to the community property seem to be at direct variance with the otherwise unbroken course of decision in that state. The court said (203 La. at 668) that no portion of the community property could be used to pay the separate debts of the husband. It also said that the wife might, without securing a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property, whenever the husband proved to be incompetent, a bad manager, or of a reckless or speculative disposition, or whenever his affairs were in such disorder that her property rights were jeopardized.

Prior to *Flournoy* v. *Wiener,* it seems to have been settled beyond any question that the entire community property was subject to all obligations

incurred by the husband during marriage,[21] including liability for his torts.[22] That no distinction was made in this regard between the husband's separate debts[23] and community debts, is clear from the fact that the community property was held liable even for his antenuptial debts,[24] and it may be pointed out that this point has been so ruled[25] after the decision in *Flournoy* v. *Weiner*.

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[21] *Phillips* v. *Phillips*, 160 La. 813; *Marshall* v. *Mullen*, 3 Rob. 328 (S. Ct. La.); *Succession of Curtis*, 10 La. Ann. 662; *Succession of Kerley*, 18 La. Ann. 583; *Theus* v. *Smith*, 189 So. 305 (La. App.).

[22] *Bauer* v. *Albers*, 187 La. 496; *Edwards* v. *Ricks*, 30 La. Ann. 926; *Hawley* v. *Crescent City Bank*, 26 La. Ann. 230; *Kelly & Frazier* v. *Robertson*, 10 La. Ann. 303.

[23] See Daggett, The Community Property System of Louisiana, 18, 48, in which it is stated squarely that the community property is liable for the separate debts of the husband.

McKay, Community Property (Second Ed.), Section 802, states that the general rule is that community property may be seized and sold on forced sale or execution to satisfy a judgment against the husband, whether or not the debt is a community debt. He excepts only the State of Washington, where he states that community debts only may be satisfied out of community property. Although Washington has no statutory provision dealing generally with the question, the rule is as McKay has stated. *Poe* v. *Seaborn*, *supra*; *Schramm* v. *Steele*, 97 Wash. 309. But this does not mean all that the rule implies, for the reason that a very liberal view is taken of what constitutes a community debt. See *Henning* v. *Anderson*, 121 Wash. 58; *Kuhn* v. *Groll*, 118 Wash. 285; *In re Levinson*, 1 F. 2d 851 (C. C. A. 9th), certiorari denied, *sub nom. Greene* v. *Booth*, 267 U. S. 598.

[24] *Davis* v. *Compton*, 13 La. Ann. 396; cf. *Glenn* v. *Elam*, 3 La. Ann. 611.

[25] *Stafford* v. *Sumrall*, 21 So. 2d 83 (La. App.).

The further statement in that case with respect to the wife's right to secure a dissolution of the community partnership and delivery into her control of half of the community property whenever her husband proved to be an incompetent manager, is also a novel concept in Louisiana jurisprudence,[26] if the statement is read in isolation and away from the background of the developed law in that state. Article 2425 of the Civil Code (Appendix C, *infra*, pp. 96–97) provides merely that the wife may apply for a separation of property when her dowry is in danger owing to the husband's mismanagement or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. The provision is primaril designed to preserve her separate estate. See *Jones* v. *Jones*, 119 *La.* 677; *Davock* v. *Darcy*, 6 Rob. 342. While it has been held that she might sue him for a separation

[26] See the strong criticism of this statement by the Louisiana court in the light of its actual decisions in Altman, The Community Property Amendment to the Estate Tax Law, 21 Tax Magazine 643, 660–661 (1943).

The opinion of the court below contains a curious inconsistency. It repeats (R. 16) the statement made by the Louisiana court in the *Flournoy* v. *Wiener* case, but also states that (R. 17) "it is not believed that any one familiar with Louisiana law would have the temerity to urge that the husband had acquired any right by his wife's death." Yet, if while the community exists his power to deal with the property is as circumscribed as the opinion earlier suggested, it would hardly seem to be over-bold to conclude that upon her death rights and powers accrued to him at that time which before were denied.

of property, even though she had no dowry or paraphernal property, where he was insolvent and it was necessary to preserve her own earnings for the support of the family (*Carite* v. *Trotot*, 105 U. S. 751; *Gastauer* v. *Gastauer*, 131 La. 1),[27] it seems never before to have been suggested in Louisiana[28] that, absent the necessity to protect her separate estate or separate earnings, a wife could secure a separation of community property merely because her husband was an incompetent manager or of a speculative nature. In the typical situation such as that here involved, where

[27] This right of the Louisiana wife is somewhat analogous to, although not as broad as, that of the wife in some of the other community property states such as Idaho, Washington and Nevada, where she is entitled to manage that part of the community property which consists of her earnings. 1 de Funiak, Principles of Community Property, Sec. 114.

[28] Nor in view of the Louisiana cases cited in *Bender* v. *Pfaff*, *supra*, do we think that this Court intended in that case to suggest such a rule. The cases cited therein hold that she may obtain a dissolution of the community in order to preserve her separate property or her future separate earnings (*Wolf & Clark* v. *Lowry*, 10 La. Ann. 272; *Webb* v. *Bell*, 24 La. Ann. 75; *Brown & Learned* v. *Smythe*, 40 La. Ann. 325), and that she may have an accounting of his administration of the community for the period subsequent to her institution of a suit for divorce or separation from bed and board (*Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065). See also Article 150 of the Louisiana Civil Code, Appendix C, *infra*, p. 85. As to the period prior to that time, *McCaffrey* v. *Benson*, *supra*, and *Frierson* v. *Frierson*, *supra*, hold that she is not entitled to any accounting.

the community consists of property acquired through efforts of the husband and the wife is not engaged in any remunerative activity, she had no means of protection against his incompetent management, speculative nature, or expensive habits. And if it was intended in *Flournoy* v. *Wiener* to broaden her right to a separation of property, she may still not recover anything with respect to community funds which the husband has already squandered in speculation or riotous living. *McCaffrey* v. *Benson, supra; Frierson* v. *Frierson, supra.*

The Supreme Court of Louisiana is, of course, the ultimate authority as to the law of that state, and presumably it can, if it chooses, overrule prior decisions. It is difficult to conclude, however, that the court did have such an intention in *Flournoy* v. *Wiener,* for it did not disapprove any of its earlier decisions which were inconsistent with the statements referred to. Cf. *Hardin* v. *Jordan,* 140 U. S. 371, 384–388. Moreover, the statements were made in connection with the court's discussion of the constitutionality of the federal statute and not in a case involving a dispute between the parties, or those claiming under them, over property rights. That *Flournoy* v. *Wiener* has not been regarded in Lousiana as effecting any change in the local law is evidenced by the holding made after that decision that the

community property is liable for the husband's antenuptial debts. *Stafford* v. *Sumrall,* 21 So. 2d 83 (La. App.).

In any event, it is not necessary to labor the issue as to what is the present state of the Louisiana law upon these specific points, since we do not believe that the question here turns upon the *minutiae* of the property relationship between husband and wife. Within the broad framework of the community property system, the relative rights, privileges, powers and immunities of the spouses vary in considerable detail in each of the community property states, and may vary in each state from time to time. We do not believe that the constitutionality of the statutory provisions here involved depends upon these details of the property relationship, for that would mean that the statutory provisions might be constitutional in some of the community property states and not in the others, or that its constitutionality in any particular state might vary from time to time in accordance with local decisions. For present purposes it is enough that, whatever may be the precise limits of the powers of the wife and the restraints upon the husband, her interest in half of the property during the husband's lifetime does not approach anything close to an exclusive right to enjoy, manage and dispose of it; the death of the husband gives to her at least these significant attributes of ownership—the right to

sole management, control, enjoyment and dispositive power.

The Attorney General of Louisiana aptly summarized the situation in his brief in *Flournoy* v. *Wiener*, when he said (p. 16):

> Of all the elements which make up that bundle of rights and privileges called ownership, very likely the most important is the right of dominion—the right to alienate and control and that is what the wife in Louisiana gets by the death of her husband. Death is the liberating event to the wife. For the first time she has title to her property in the sense that she is capable of conveying it, mortgaging it, or making a donation *inter vivos*. For the first time she can take the revenues of her property; for the first time in any real sense she can call it her own.

3. *The statute is well within the scope of the Congressional power*

a. *Section 402 (b) (2)*.—The substantial alterations in the relationship of the spouses to the property which were occasioned by the death of the decedent here, furnish ample basis for the Congressional action. In *Tyler* v. *United States*, 281 U. S. 497, the Court sustained the constitutionality of the provision of the estate tax law which requires the inclusion in the gross estate of the full value of property held by a decedent and his spouse as tenants by the entirety (excluding that

portion economically traceable to the survivor). The opinion pointed out (p. 503) that the question in cases of this nature—

> is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The opinion further noted (p. 503) that under local law no interest was regarded as passing to the survivor upon the death of the other spouse, but held that point to be not material. Since upon the death of one the survivor's relationship to the property was altered in a substantial degree, the statutory mandate was (p. 505) "obviously neither arbitrary nor capricious". The changes which the Court there deemed to be sufficiently substantial to warrant the Congressional action were thus stated (pp. 503–504):

> Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights

> were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will.

Subsequently *United States* v. *Jacobs,* 306 U. S. 363, sustained the power of Congress to require the inclusion in the gross estate of the full value of property held by the decedent and any other person as joint tenants (excluding that portion economically traceable to the other). This result was reached even though the changes in the survivor's relationship to the property which followed the death of the other tenant were not as great in the case of the joint tenancy as in the case of the tenancy by the entirety. In the case of the tenancy by the entirety involved in *Tyler* v. *United States,* neither tenant could have disposed of any part of the estate without the consent of the other, but in the joint tenancy considered in the *Jacobs* case either could, at any time and for any reason, have sold his or her interest in the property and severed the tenancy. Yet, as the Court pointed out, unless the joint

tenancy were so severed the entire estate would pass to the survivor; and at that time the survivor would acquire the sole right to sell the entire property without the risk of loss which might have resulted from partition of the tenancy during its existence. This was deemed to be (p. 371) a sufficient "shifting of economic interest", a sufficient "change for the survivor's benefit" to sustain the Congressional action.

The *Tyler* and *Jacobs* cases do not purport to establish the outer limits of the Congressional power, but in any event the instant case is well within these decisions. The alteration in the wife's relationship to the community property, the shifting of economic interest, which occurred upon the death of the decedent here, is far more substantial than those which were deemed sufficient in the *Tyler* and *Jacobs* cases. Whatever power she may have had prior to the death of the decedent to secure a separation of property, it was certainly not as broad as the unrestricted power which the wife had in the *Jacobs* case to dispose of her half interest for any reason whatsoever, or, indeed, for no reason at all if she felt so inclined. And the death of the husband here resulted in much more than merely freeing the wife's powers of possession, use and enjoyment from the exercise of co-equal rights of her husband (as in the *Tyler* case).

The court below sought to distinguish (R. 18) the *Tyler* and *Jacobs* cases on the ground that

survivorship is an incident of joint tenancies and tenancies by the entirety; that the death of one gave to the other a power of testamentary disposition not previously enjoyed; and that this is not the case with community property since each spouse has power of testamentary disposition over half of the property.[29] While it is true that succession to the testamentary power was one of the incidents relied upon in the *Tyler* and *Jacobs* cases, the basis of those decisions was by no means limited to that factor. That is only one of the incidents of ownership of property, and was only one of those that shifted at the death of the decedent. Nor did those decisions in any way intimate that the shifting of that particular incident was the only one which could justify Congress in extending the coverage of the estate tax to co-owned property. They recognize that the shifting of any group of the incidents of ownership, any substantial economic interest, is enough. See *Whitney* v. *Tax Commission,* 309 U. S. 530, 539. And, as we have pointed out, the rights and privileges which the wife acquired here, with respect to her half interest, upon the death of the decedent are at least as extensive as those which were acquired by each of the surviving wives, with respect to her half interest, in the *Tyler* and *Jacobs* cases.

[29] This is not true in Nevada and New Mexico. In those states the wife has no power of testamentary disposition. 1 de Funiak, Principles of Community Property 717, fn. 39.

The *Tyler* and *Jacobs* cases are also sought to be distinguished on the ground that there the wife "contributed" nothing to the co-owned property, whereas under the local law the wife here is regarded as having "contributed" equally to the acquisition of the community property, even where it consists entirely of her husband's earnings and the income from his separate property. That argument is based upon the fiction in community property states that the wife "earns" half of the income attributable to her husband's efforts, and that she therefore "contributes" one-half of the community estate. But it is not to be assumed that the wife's participation in her husband's efforts is any less in any of the non-community states, and it is appropriate for Congress to *classify* these situations similarly. Thus, there is no reason to believe that the wife, in cases of joint tenancies, was any less responsible for her husband's accumulation of the property involved. Nor can one assume that she participated less in her husband's affairs in cases where her dower interest is included in his gross estate.

Moreover, the foregoing contention also misses the essential rationale of the opinions in the *Tyler* and *Jacobs* cases. They did not turn upon a consideration of the source or origin of the co-owned property, but upon the facts that such a state of co-ownership existed at the time of death and that death was the occasion for enlargement of the survivor's rights and powers.

Thus in *Dimock* v. *Corwin* (decided with the *Jacobs* case) a part of the joint property had been contributed by the surviving wife. Although it is true that the property she had contributed had been given to her by her husband prior to the creation of the joint tenancy, nevertheless after the gift it was hers to do with as she pleased; yet the full value of the joint tenancy was held to be includible in the husband's estate. This decision also negatives the further suggestion which has been advanced that it is critical to the validity of such a statute that the tax be measured by no more than the value of property which has been the subject of a transfer by the decedent with the retention of rights until his death. Moreover, it has been held that the full value of the co-owned property is includible in the gross estate even though the tenancy was created prior to the enactment of the first estate tax in 1916. The *Jacobs* and *Dimock* cases were such cases. See also *Third National Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618; *Whitney* v. *Tax Commission*, *supra*.[30]

[30] These cases also effectively dispose of the contention (see the opinion of the District Court in the *Rompel* case, R. 19–20) that the 1942 amendments are unconstitutionally retroactive. See also *Milliken* v. *United States*, 283 U. S. 15.

There are only a few instances in our history in which this Court has held a federal tax to be unconstitutional on the ground of retroactivity. *Nichols* v. *Coolidge*, 274 U. S. 531 (Justices Holmes, Brandeis, Sanford and Stone concurring only in the result); *Blodgett* v. *Holden*, 275 U. S. 142 (equally

Furthermore, there is plainly no constitutional mandate which binds Congress in enacting revenue legislation to the "amiable fiction" of the civil law that a Louisiana wife earns half of her husband's salary, any more than it is bound by the "amiable fiction" of the common law, in dealing with tenancies by the entirety, that husband and wife are one person. See *Tyler* v. *United States, supra,* p. 503. The fictional basis of the Louisiana law in this respect is emphasized by the fact that the wife's interest is the same even though she may in fact be unable to make any contribution to the marital partnership.[31] Thus even though the wife should be insane, and in fact a helpless burden to the community rather than an aid thereto, her rights continue and the husband cannot secure a separation of property. See *Hotard* v. *Hotard,* 12 La. Ann. 145, in which the court said:

> It may be true, that among the rude and hardy tribes of German origin who introduced the custom of the matrimonial community of gains into Gaul, whence it has been transmitted to us, the wife was the equal partner of her husband's toil. If, in the change of manners which a higher

divided count, Justice Holmes, Brandeis, Sanford and Stone concurring only in the result); *Untermyer* v. *Anderson*, 276 U. S. 440 (Justice Sanford concurring only in the result and Justices Holmes, Brandeis and Stone dissenting). Cf. *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98.

[31] Cf. Altman, Community Property: Avoiding Avoidance by Adoption in the Revenue Act, 16 Tax Magazine 138, 184 (1938).

civilization has produced, this prime reason of the community law has ceased to exist, yet the institution remains.

The treatment which has long been accorded dower and curtesy interests (or their modern statutory substitutes) furnishes strong support for the Congressional action here involved. The statute has since 1918 required the inclusion in the gross estate of such an interest of a surviving spouse, and this provision has been held valid even though under state law the interest of the survivor is regarded as vested by virtue of the marriage and as not passing by descent.[32] There are, of course, technical differences between a surviving spouse's compulsory share in the common law states and the rights of a surviving spouse in a community property state. But these technical differences afford no ground for distinctions upon the constitutional level. Both are systems which have been developed for the regulation of marital property rights; under both provision is made for a non-barrable interest in the surviving spouse;[33] and neither represents an interest created by a private conveyance. It is hardly appropriate to enter into a discussion of which is the better system, but it should not be forgotten that the community property system is at most

[32] See the cases collected in I Paul, Federal Estate and Gift Taxation, Sec. 5.03, fn. 1.

[33] All but very few of the states provide for such a compulsory share for the surviving spouse. See 3 Vernier, American Family Laws, Sections 189 and 216.

only one mode of arranging marital property rights. See Powell, Community Property—A Critique of its Regulation of Intra-Family Relations, 11 Wash. L. Rev. 12 (1936).

An additional strong analogy is to be found in the Louisiana institution of forced heirship which is written into the Louisiana Constitution.[34] Forced heirs are children (or their descendants) and parents (Louisiana Civil Code, Articles 1493–1495, Appendix C, *infra*, pp. 85–86). They have an interest, known as the *legitime*, of which they cannot be deprived except upon specific and narrowly circumscribed grounds.[35] The *legitime* may not be defeated even by gifts *inter vivos* for upon the death of the donor the forced heirs may recover from the donee all of the excess over the "disposable portion."[36] They need show no fraud or intent to defeat their *legitime*. At the donor's death they simply have an absolute right to a share of the total of (a) the value of the property in the estate, plus (b) the value, as of the time of death, of all property given away by the decedent,[37] regardless of when

[34] Louisiana Constitution (1921), Article IV, Sec. 16.

[35] The permissible reasons for disinheritances are set forth in Articles 1621–1623 of the Louisiana Civil Code (Appendix C, *infra*, pp. 86–87). There are ten grounds upon which a child may be disinherited, nine for descendants of a child, and seven for parents.

[36] The "disposable portion" varies from one-third to two-thirds depending upon the number of surviving children or their descendants.

[37] Louisiana Civil Code, Articles 1502, 1505.

it was given away.[38] Since a wife may recover a share of community property which has been disposed of by her husband only in the case of a fraudulent disposition and then only on "satisfactorily proving the fraud" (Article 2404 of the Louisiana Civil Code), it has been observed that the *legitime* is accorded a broader safeguard than the community interest of the wife. See Cahn, Restraints On Disinheritance, 85 Pa. L. Rev. 139, 153, fn. 45 (1936).

The decedent's relationship with respect to the half of the community property which went to his wife was thus not very different from his relationship to most (two-thirds, since he was survived by more than two children) of the other half. Both the wife and the children had rights to share, in amounts fixed by the local law, in all of the property remaining at his death. Yet it seems never to have been suggested, and certainly could not rightly be contended, that the compulsory share of his children could not be included in his gross estate for purposes of the federal tax.[39] And it is difficult to perceive how Congress can be said to be constitutionally for-

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[38] Thus children, as forced heirs, may recover from a donee property given away by their father before he was married. *Guidry* v. *Caire*, 181 La. 895.

[39] The tax may apply even though the decedent was completely without power of testamentary disposition. For example, infants and insane persons may not dispose of their property by will, yet their estates are of course subject to the tax. See as to insane persons, *City Bank Co.* v. *McGowan*, 323 U. S. 594.

bidden to accord similar treatment to situations so similar to each other in their practical aspects.

It should be emphasized that the statute may be invalidated under the Fifth Amendment only if it is completely arbitrary and capricious. We do not believe that it can be said that Congress completely overstepped the bounds of reason in concluding that the changes which occurred upon the death of the decedent here are sufficiently similar to those which have long been the occasion for the tax to require, in the interests of uniform and equitable operation, that this situation be accorded similar treatment.

In fact, it had been settled long prior to the *Tyler* case that the shifting of economic interests resulting from the death of a spouse in a community property state furnished ample occasion for the imposition of a death duty. *Moffitt* v. *Kelly*, 218 U. S. 400, held that there was no violation of the Fourteenth Amendment in the imposition of the California inheritance tax upon the full value of the community property on the death of the husband.[40] And it should be noted that whatever restraints the Fifth Amendment imposes upon the exercise of the federal taxing

[40] The fact that it was subsequently held that the California wife's interest in the community property prior to 1927 was not a vested interest (compare *United States* v. *Robbins*, 269 U. S. 315, with *United States* v. *Malcolm*, 282 U. S. 792) in no way impairs the authority of *Moffitt* v. *Kelly*, *supra*, for that case was decided upon the assumption that her interest was "vested."

power, they are not as great as those imposed upon the states by the Fourteenth Amendment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

Congress has concluded that, from the standpoint of the practical impact of the estate tax, it is necessary, in order to equalize the operation of the tax throughout the country, to treat community property in the same way in which it has treated tenancies by the entirety, joint estates, and compulsory shares of surviving spouses and others in the estate of a decedent. We respectfully submit that Congress may not properly be charged with having played the despot[41] in concluding that that which it has ordained comports with the realities of tax life.

At bottom the issue here is simply one of the power of Congress to classify. Since, however, it is so well settled that Congress has the broadest powers of classification in relation to taxation (*Steward Machine Co.* v. *Davis*, 301 U. S. 548), the challenge to the statute has been couched in different language. Cf. brief of Attorneys General of California, Arizona, etc., in *Flournoy* v. *Wiener*, p. 26, fn. 11. But reduced to its essentials the argument comes to this: Differences between the community property system on the one hand, and joint estates, tenancies by the entirety and compulsory shares of surviving spouses, on the other, are advanced as reasons why Congress

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[41] Cf. *Burnet* v. *Wells*, 289 U. S. 670, 682.

should not be permitted to treat them in a similar fashion. But these considerations are legislative in character; they are relevant only with respect to the desirability of the legislation, not its validity.

b. *Section 404 (a)*.—The constitutionality of the amendments made by Section 404 (a) of the Revenue Act of 1942 to Section 811 (g) of the Internal Revenue Code, relating to the inclusion in the gross estate of proceeds of policies of insurance, was not dealt with by the court below as an independent issue. In the main this section does not present any substantially different problem from that presented by Section 402 (b) (2) and all of the reasons which refute the charge that Section 402 (b) (2) is invalid are equally applicable to Section 404 (a). There are, however, additional reasons which support the validity of Section 404 (a) as here applied.

The amendments made by Section 404 (a) are not directed primarily at the community property problem. They deal with insurance policies acquired with community funds only as an incident to the broader purpose of the section to resolve problems relating generally to the inclusion of the proceeds of insurance policies in a decedent's estate. Section 811 (g) had previously required the inclusion in the gross estate of the proceeds of policies of insurance "taken out by the decedent" upon his own life. The generality of the phrase "taken out by the decedent" had been productive

of much uncertainty. It was not clear whether proceeds of a policy of life insurance were to be included in a decedent's gross estate only to the extent to which he had paid the premiums or whether, regardless of whether he had paid the premiums, they could be included in the gross estate if the decedent at the time of his death had substantial incidents of ownership in the policy, such as the right to surrender it for cash or to change the beneficiary. Attempts to settle the matter by administrative regulations not having been successful (see 1 Paul, Federal Estate and Gift Taxation, Sections 10.12–10.14), Congress amended the Code by Section 404 (a) of the Revenue Act of 1942, for the express purpose of clarifying the subject. H. Rep. No. 2333, *supra*, p. 162; S. Rep. No. 1631, *supra*, p. 234. The section provides for the inclusion of the proceeds of insurance policies in a decedent's gross estate if he has paid the premiums *or* has retained incidents of ownership in the policy. Among the examples of "incidents of ownership, the possession of which at death forms the basis for inclusion of insurance proceeds in the gross estate," the committee reports list "the power to change the beneciary". H. Rep. No. 2333, p. 163; S. Rep. No. 1631, p. 235. The decedent in this case had that power with respect to each of the policies here involved.

Section 404 (a) does not appear to be in any way challenged by the appellees, insofar as its

general operation is concerned. The contention seems to be not that these amendments are in general invalid, but that in giving effect to them Congress had no power to provide further that (a) insurance premiums shall be deemed to have been paid by the insured if they were paid with community funds not attributable to the earnings or income from the separate property of the surviving spouse, and (b) that the term "incidents of ownership" shall include such interests "possessed by the decedent at his death as manager of the community".

Insofar as the first of these points is concerned, it is clear that, if for the reasons previously advanced herein, the funds with which the premiums were paid might have been included in the decedent's gross estate if they had been retained until his death, there can be no greater objection to the inclusion in his estate of the proceeds of insurance policies purchased with those funds.

No question is properly raised by the instant case with respect to the validity of the further statutory direction that insurance proceeds shall be included in the gross estate if the decedent possessed, at the time of his death, incidents of ownership with respect to the policy in his capacity as manager of the community. For the power which the decedent here had to change the beneficiary in each policy was one which was strictly personal to him. His wife did not take the proceeds of the policies by virtue of any community

interest therein. Her interest derived solely from the contract of insurance, and she took the proceeds only because she was the named beneficiary at the time of his death. Regardless of the fact that the policies were contracted for during the marriage, and regardless of the further fact that the premiums had been paid with community funds, under Louisiana law the decedent could at any time have changed the beneficiary to whomsoever he chose. *Sizeler* v. *Sizeler,* 170 La. 128; *In re Sun Life Assur. Co.,* 155 So. 399 (La. App.); *DeLappe* v. *Commissioner,* 113 F. 2d 48 (C. C. A. 5th); *Prudential Ins. Co. of America* v. *Taylor,* 46 F. Supp. 115 (W. D. La.). The decedent therefore had full power to direct the disposition of the insurance proceeds at his death. And since that power was not restricted by any concept deriving from the community property system, or in any other way, it was in no sense one exercised by him "as manager of the community". This is enough, quite aside from any other consideration, to support the inclusion of the proceeds of these policies in his gross estate. There is thus an independent basis for the valid application here of Section 404 (a).

4. *The burden of the tax*

It has been suggested that the federal statute requires the heirs or legatees of the decedent to bear the entire weight of the tax, leaving the surviving spouse's share free of any burden. It is said that where there are children who would nor-

mally be the beneficiaries of the decendent's testamentary disposition, this might result in leaving nothing for the children, but the wife, although she might be less deserving, would take her full share.

So far as the federal law deals with the problem it provides that the tax shall be a lien on all of the property included in the decedent's gross estate. Internal Revenue Code, Section 827 (a); *Detroit Bank* v. *United States,* 317 U. S. 329, 331–333. The tax is therefore a lien on all of the community property brought within the gross estate and under Section 827 (b) of the Code, as amended by Section 411 of the Revenue Act of 1942 (Appendix A, *infra,* p. 75), the surviving spouse is personally liable for the tax to the extent of the value of his or her share of the property. Moreover, the federal statute contemplates that the tax "be paid out of the estate before its distribution." (Internal Revenue Code, Section 826 (b).) This language seems to be literally applicable to the community property interest of the surviving spouse, since his or her sole ownership right attaches only to half of the residue of the property remaining after the death of the other spouse. Therefore, if the question were one of federal law alone it seems that the weight of the federal tax would be borne equally by the surviving spouse and the legatees of the decedent.

But the conclusive answer to the whole argument on this point is that the federal statute does

not undertake to specify how the burden of the tax shall finally be distributed. It provides for payment of the tax out of the estate as a whole, leaving to the states the determination of its ultimate thrust. *Riggs* v. *Del Drago,* 317 U. S. 95. If, therefore, it should develop that there is really a problem with respect to the distribution of the tax burden, it is one which the states have ample power to resolve.

5. *The effect of the statute where the wife predeceases the husband*

Various contentions have been advanced with respect to the operation of the statute in cases in which the wife predeceases the husband. With respect to all of these it may be observed that no such case is here presented, and it is fundamental that one may complain only of violation of his own constitutional rights, not those of another. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 177; *Heald* v. *District of Columbia,* 259 U. S. 114, 123; *Virginian Ry.* v. *Federation,* 300 U. S. 515, 558. Statutes are not declared unconstitutional by a measure of their possible effect in supposititious cases. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 355, rehearing denied, 302 U. S. 772; *Tennessee Pub. Co.* v. *Amer. Bank,* 299 U. S. 18, 22. In any event we think it plain that there is no constitutional objection to the statute in such cases.

The statute continues the pre-existing law by requiring that there be included in the gross es-

tate at least that portion of the community property which was subject to the decedent's power of testamentary disposition. Thus if in the instant case the decedent's wife had predeceased him, one-half of the community property then existing would have been includible in her gross estate since she had power of testamentary disposition over that portion. It is difficult to perceive how there could be thought to be any objection to this operation of the statute for while the free power of testamentary disposition over property is not an indispensable requisite to the operation of the tax,[42] that is the most obvious situation in which the tax applies. The wife's power of testamentary disposition is equivalent to a general power of appointment. The statute has long taxed the value of property passing under the exercise of a general power of appointment,[43] and now taxes the value of such property to the holder of such a power whether he chooses to exercise it or not.[44]

If all of the community property represents earnings of the wife, or income from her separate property, then it will all be included in her estate, if she should die first. It is contended that since the husband was previously entitled to manage the property, there is at her death no shift of economic interest to him with respect to

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[42] See fn. 39, *supra*, p. 43.

[43] *Estate of Rogers* v. *Commissioner*, 320 U. S. 410.

[44] Section 811 (f) of the Internal Revenue Code, as amended by Section 403 (a) of the Revenue Act of 1942.

his half. If, however, the rights of the wife in the property during the existence of the community are as broad as was stated by the Supreme Court of Louisiana in *Flournoy* v. *Wiener*, then it is apparent that at her death he is relieved from a number of serious limitations upon his power to deal with the property. And even if the limitations upon his powers should be thought to be narrower than would appear from an isolated reading of *Flournoy* v. *Wiener*, nevertheless, upon the death of the wife his interest in the property is freed from the fetters deemed substantial in *Bender* v. *Pfaff*, *supra*.

6. *The so-called irrebutable presumption*

The statute excepts from the gross estate that portion of the community property which represents the earnings, or the income from the separate property, of the surviving spouse. It is argued that since it is not possible to trace the source of community property in order to show the portion, if any, which should be excluded, the statute creates an irrebutable presumption that the whole community property was produced by the spouse first to die and taxes the whole property to the estate of that spouse.

It is plain that the purpose of the section is simply to limit the amount of property includible in the estate of whichever spouse first dies to that portion of it which is economically attributable to him or her. S. Rep. No. 1631, p. 231 (Appendix

B, *infra*). It is true that the statute places the burden upon the taxpayer of showing the portion which should be excluded, but this simply follows the traditional pattern which obtains in tax cases of placing the burden of proof, not upon the Government, but upon those who are in possession of the facts. *Welch* v. *Helvering*, 290 U. S. 111, 115. The provision is certainly justifiable as a means of facilitating the administration of the statute.

The characterization of the provision as an "irrebuttable presumption" is plainly without support in the statute. Nor do we agree that it is not practically possible to show what part of the property, if any, is economically attributable to the surviving spouse. The burden is no different from that of showing what part of the property owned by the spouses at the time of the death of one of them is separate as distinguished from community property, a burden which the estate of such a spouse is already required to assume, not only for purposes of administration and succession but also for purposes of federal estate, gift and income taxes.[45] Nor is the problem different from that of showing what portion of the co-

[45] See, e. g., *Beals* v. *Fontenot*, 111 F. 2d 956 (C. C. A. 5th); *Gump* v. *Commissioner*, 124 F. 2d 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697; *Scofield* v. *Weiss*, 131 F. 2d 631 (C. C. A. 5th); *Shea* v. *Commissioner*, 81 F. 2d 937 (C. C. A. 9th); *Hill* v. *Commissioner*, 24 B. T. A. 1144; *Estate of Wilson* v. *Commissioner*, 2 T. C. 1059.

owned property was contributed by the surviving spouse in the case of joint tenancies and tenancies by the entirety. See, e. g., *Berkowitz* v. *Commissioner,* 108 F. 2d 319 (C. C. A. 3d); *Richardson* v. *Helvering,* 80 F. 2d 548 (App. D. C.). In the typical situation, such as is here involved, where the community property has been produced by the husband's efforts, there is no problem of tracing. The whole is clearly to be included in the gross estate of the husband, if he dies first and if the wife dies first, only one-half will be included as before the 1942 amendments.

Certainly, it cannot be assumed, on the basis of the facts in this case or those in the companion *Rompel* case, that the statute does impose an impossible burden. Such a conclusion could be reached only after a claim was made that some part of the property was economically attributable to the wife, all available facts had been submitted in substantiation of the claim and, nevertheless, the claim had been rejected. See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, rehearing denied, 302 U. S. 772. Constitutional questions of this character are not to be decided in advance upon the basis of assumptions and conjectures.

It has been argued that the community estate might not be attributable to the earnings of either spouse or to income from his or her separate property but might have been acquired on

credit of the community. But all community accumulations must have their beginning in the efforts of one of the spouses and in any event problems such as these must await the application of the statute in particular cases. Clearly, the statute gives scope for proper interpretative regulations in carrying out the will of Congress that the portion economically attributable to the surviving spouse shall be excluded (S. Rep. No. 1631, p. 231), and if the rules of allocation adopted by the Treasury appear unjust and unreasonable, they can be challenged in the courts. Cf. *Berkowitz* v. *Commissioner, supra,* and *Richardson* v. *Helvering, supra.* Unconstitutionality of the statute cannot be predicated on an assumption that upon some hypothetical set of facts, not present here, the statute might be harshly or unreasonably applied. Cf. *Anniston Mfg. Co.* v. *Davis, supra.*

C. THE UNIFORMITY AND APPORTIONMENT REQUIREMENTS

It is contended that the statute offends the uniformity requirement of Article 1, Section 8, Clause 1, of the Constitution, and in the *Rompel* case the District Court so concluded. It may be remarked parenthetically that, since the prime purpose of the 1942 amendments was to eliminate inequalities in the application of the tax and to achieve a greater degree of uniformity in its operation throughout the country, it is somewhat ironic to find them attacked upon this ground.

It has long been settled that within the meaning of this constitutional provision a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U. S. 580, 594.[46] The fact that the extent and incidence of a tax may be affected by differences in state laws does not result in an infringement of the uniformity requirement (*Phillips* v. *Commissioner*, 283 U. S. 589, 602; *Riggs* v. *Del Drago*, 317 U. S. 95, 102) for the requirement is one of geographic uniformity, not of intrinsic equality and uniformity in operation (*Knowlton* v. *Moore*, 178 U. S. 41, 83–109). The Constitution does not require that a tax "have an equal effect in each State." *Id.* p. 104. The 1942 amendments obviously lay down a uniform rule with respect to community property interests wherever they may be found. It is not material that such interests may not be found in all of the states for "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell

[46] See also *Nicol* v. *Ames*, 173 U. S. 509, 521; *Patton* v. *Brady*, 184 U. S. 608, 622–623; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158, 174; *Billings* v. *United States*, 232 U. S. 261, 282–284; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24; *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392–393; *Bromley* v. *McCaughn*, 280 U. S. 124, 138; *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463.

out a lack of uniformity". *Poe* v. *Seaborn*, *supra*, pp. 117–118.[47]

The holding by the District Court in the *Rompel* case that the amendments violate the uniformity requirement proceeds from a misconception both of the nature of the estate tax in general, and of that of the amendments. The court there said (*Rompel* R. 21, 22) that the estate tax is one "laid on transfers at death of property owned by the decedent"; that "This is the rule applicable to all states, common law and community property alike", but in community property states "The acquisition of property acquired during marriage" is made an additional "subject of tax"; and that this subject is not taxed in the other states. This is hardly an accurate analysis.

The federal estate tax has, it is true, been described as one upon the transfer of property at death.[48] But such statements, while they are a sufficiently critical description of the tax in

[47] The estate tax at one time provided for the inclusion in the gross estate of real property only if it was subject to administration expenses. Although the effect of this provision was to make realty subject to the tax only in some thirty-six states, it was nevertheless held to be not violative of the uniformity requirement. *Gottlieb* v. *White*, 69 F. 2d 792 (C. C. A. 1st), certiorari denied, 292 U. S. 657; *Continental Illinois Bank & Trust Co.* v. *United States*, 65 F. 2d 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663; cf. *Crooks* v. *Harrelson*, 282 U. S. 55.

[48] E. g., *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Nichols* v. *Coolidge*, 274 U. S. 531, 537.

general and for most purposes, did not purport to be, and are not, completely comprehensive characterizations. The statute does of course operate upon such transfers. This is the office of Section 811 (a) which directs the inclusion in the gross estate of all property "to the extent of the interest therein of the decedent at the time of his death". That, however, by no means marks the limit of the scope of the tax. The other subdivisions of Section 811 are directed not at property passing at death, but at property which may have been the subject of any of a variety of *inter vivos* transfers (many of them complete and beyond any control by the transferor) and at other situations in which there has not even been a transfer at any time by the decedent. All of these have been included because Congress has deemed them to be of sufficiently practical economic equivalence to transfers at death to justify, in the interests of securing a fairer operation of the tax, an equivalent treatment.

Under Section 811 (c) there must be included in the gross estate property which has been transferred in contemplation of death; yet the decedent could not be described, even in the loosest sense, as the "owner" of such property at the time of his death.[49] The same section requires the inclusion

[49] In many cases in which property has been held to be includible in the gross estate on the ground that it had been transferred in contemplation of death, the transfers occurred a long time prior to death. For example, the period between

in the gross estate of irrevocably transferred property with respect to which the decedent has retained a life estate (*Helvering* v. *Bullard,* 303 U. S. 297), although at that time "no interest in the property" passes, death having merely "obliterated" the life estate (*May* v. *Heiner,* 281 U. S. 238, 243). Section 811 (d) covers transferred property with respect to which the decedent has retained the power to make any change in the enjoyment, even though such power could only be exercised with the consent of parties having adverse interests. *Helvering* v. *City Bank Co.,* 296 U. S. 85.

Nor is the scope of the statute limited to property with respect to which the decedent has at some time made a transfer. Under Section 811 (b) the dower or courtesy interest of the surviving spouse must be included in the gross estate, although such an interest is not regarded as ever having been the subject of a transfer from the decedent to the survivor.[50] Section 811 (f) covers property with respect to which the decedent had a general power of appointment, regardless of whether the power was exercised, and as well

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the transfer and the death was more than ten years in *In re Kroger's Estate,* 145 F. 2d 901 (C. C. A. 6th), certiorari denied, April 2, 1945, and it was nineteen years in *Estate of Gane,* decided January 3, 1945 (1945 P-H T. C. Memorandum Decisions Service, par. 45,007).

[50] See pp. 40–41, *supra.*

where the power is one which has been donated[51] to the decedent as where it is one which he has retained. And Section 811 (e) relates to property held in various forms of co-ownership, joint tenancies, tenancies by the entirety, and now community property.

These examples sufficiently illustrate that the scope of the estate tax is not limited to property transferred by the decedent at his death, or even to property with respect to which the decedent has at some time made a transfer.

An attempt is made here, as in *Whitney* v. *Tax Commission,* 309 U. S. 530, to distinguish these instances on the ground that they involve mere substitutes for testamentary dispositions, but this "disregards the emphasis in these cases on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax." *Whitney* v. *Tax Commission, supra,* p. 539.

The characterization by the court in the *Rompel* case of the 1942 amendments as levying a tax

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[51] It may be further observed that the donee of such a power has frequently been characterized as not the "owner" of the property over which it may be exercised. *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 59; *Townshend* v. *Harrowby*, 27 L. J. (Ch.) 553, 557; *In re Armstrong*, 55 L. J. Q. B. 578, Part 2; *Gilman* v. *Bell*, 99 Ill. 144, 150; *R. I. Hospital Trust Co.* v. *Anthony*, 49 R. I. 339, 343; 1 Tiffany, Real Property (Second ed.), Sec. 315; Gray, The Rule Against Perpetuities (Fourth Ed.), Sec. 474.2.

upon "The acquisition of property acquired during marriage" is even more obviously erroneous. No such event is made the occasion for the tax. Precisely as in the case of the other forms of joint ownership dealt with by Section 811 (e), the occasion for the tax is the death of one of the owners of co-owned property and the shifting at that time of economic benefits therein to the survivor. There is no tax upon "The acquisition of property acquired during marriage".

Since the Constitution imposes no requirement that a tax have an equal operation in each state, we do not think it necessary to discuss in detail the various hypothetical situations which have been advanced as illustrations of instances in which the total tax burden of spouses in the community property states will be greater than that of spouses in the common law states.[52] For even

[52] This is not to say that we agree that the illustrations advanced do show that the community property states will be in a disadvantageous position. Some of them involve a comparison of dissimilar situations and others proceed from erroneous statements with respect to the operation of the statute.

For example, it is not true that community interests are denied the credit against the tax allowed by Section 812 (c) for property which has within five years been taxed in a prior decedent's estate. Treasury Regulations 105, Sec. 81.41 (Appendix A, *infra*, p. 76).

Nor is it true that only half of the community debts may be deducted. While there has been no formal ruling on the point, by letter of May 24, 1943, the Bureau of Internal Revenue has advised an Internal Revenue Agent in Texas,

if it should be assumed that the unequal operation complained of will in fact result the answer is that (*LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392–393)—

> The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation.

There runs through all of the cases a fundamental appreciation that whenever inequalities may be present in the operation of a federal tax, the remedy does not lie in restricting the power of Congress by a strained and narrow construction of the Constitution. The recognition of latitude in the legislative branch of the Government to deal with such matters permits them to be alleviated as they make themselves manifest. And the history of federal taxation discloses a picture of constant Congressional effort in that direction (the very amendments here involved are

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in response to his inquiry, that "where the whole community property is included in the decedent's gross estate, the full amount of the community debts and administration expenses should be allowed as deductions. Where less than the full community estate is included, deductions should be allowed in the proportion that the community property included in the gross estate bears to the total community property." In the instant case the whole of the community debts and expenses have been allowed as deductions. (R. 10.)

illustrative), rather than in the direction of inequality. In this connection it may be observed that it is of no little historical significance that no case has been found in which this Court has ever felt it necessary to strike down a revenue measure on the ground that it violated the uniformity requirement.

Although we do not believe that there is any adequate basis for the allegations that the community property states will find themselves at a disadvantage[53] with respect to the estate tax, or that any such disadvantage would result in abandonment of that system (see pp. 68–69, *infra*), the fact that they have it within their power to eliminate any such disadvantage by changing their local statutes[54] constitutes an effective answer to

[53] In many cases spouses in community property states still retain a substantial tax advantage. For example, in a community property state where the wife dies first and the situation is the typical one in which the community property consists of assets accumulated as a result of the husband's efforts, the wife's estate will be taxed with respect to one-half of the value of the property, leaving the husband's estate to be taxed only with respect to the remaining half. In the common law states, on the other hand, the entire tax will be borne by the husband's estate and due to the graduated rates that tax will be greater than it would have been had the aggregate estate been divided and taxed as two units.

[54] Indeed, in some of the community property states husband and wife may by agreement overcome the effect of the community property law. This may be done at any time during the marriage in California (*Estate of Watkins*, 16 Calif. 2d 793); Washington (*State ex rel. Van Moss v. Sailors*, 180 Wash. 269), and Arizona (*Estate of Baldwin*,

the contention that the 1942 amendments violate the uniformity requirement. Even if they had to amend their constitutions to secure for their citizens equality with the citizens of other states in the matter of federal estate taxation, the federal statute would nevertheless not be in contravention of the uniformity clause. *Florida* v. *Mellon*, 273 U. S. 12.[55]

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50 Ariz. 265). In Louisiana such an agreement may not be entered into after the marriage but the parties may agree prior to marriage or in their marriage contract that the community of acquets and gains shall not apply to them. Articles 2332, 2392, 2399 and 2424 of the Louisiana Civil Code, Appendix C, *infra*, pp. 87–88, 92, 96.

[55] Some of the community property states originally had the common law system. See I de Funiak, Principles of Community Property, c. IV. In Arizona, Chapter XXVII of the Arizona Code (Howell's) adopted by the first territorial legislature on November 10, 1864, contained 32 sections relating to dower. The law of community property was not adopted until 1865, by an act of the second territorial legislature, dated December 3, 1865, Section 10 of which expressly provided that there should no longer be any estate of dower and courtesy allowed. This statute embodied almost verbatim the provisions of the original California community property law of 1850. In Idaho, the first territorial legislature, by a sweeping act, approved June 4, 1864, adopted the common law of England "as the law of the land in the territory," so far as the same was not inconsistent with the provisions of the Constitution and laws of the United States, the organic law of the territory, and the laws of the territory. The community property law, also taken almost verbatim from the original California statute, was first adopted at the fourth session of the territorial legislature by an act approved January 9, 1867. In Nevada, too, the very first act of territorial legislature at its first session was to provide that the common law of England, so far as it was not

Little need be said concerning the contention that the tax is direct within the meaning of Article 1, Section 2, Clause 3 and Article 1, Section 9, Clause 4 of the Constitution, and therefore invalid because not apportioned. The argument, proceeding from the assertion that there has been no transfer to the wife but that she merely takes that which she always "owned", is precisely that which was rejected in the *Tyler* case, *supra.* See also *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160. Similarly with respect to the further suggestion that the tax is in effect one upon the community property itself the tax is (*Phillips* v. *Dime Trust & S. D. Co., supra,* p. 165)—

> a valid indirect tax, measured by the value of the property, rights in which devolved

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repugnant to, or inconsistent with the Constitution or laws of the United States, or the law of the territory, should be the rule of decision in all courts of the territory. This was in effect, so far as concerns property rights, until the first community property law was enacted (Stat. 1864–1865, p. 239). *Darrenberger* v. *Haupt,* 10 Nev. 43; *Lake* v. *Bender,* 18 Nev. 361, 382. In Washington, the common law right of dower and courtesy existed from 1855 to 1869. The right of dower is repeatedly referred to in the laws up to that time and was elaborately provided for at the 1864 session of the territorial legislature by an act, which, like the Arizona statute of 1864, covered 32 sections and was passed on June 30, 1864. A community property act, also in substantially identical language as the original California act, was first adopted by an act approved November 29, 1871. The latter act was in turn displaced by the act of November 14, 1879, which, with amendments, is in effect today. As to Oklahoma, and Oregon, see fn. 56, p. 68.

> upon the surviving [spouse] upon the happening of an event, the death of the other [spouse] * * *

And this is true regardless of how the weight of the tax may ultimately be felt.

D. THE TENTH AMENDMENT

The Tenth Amendment is simply declaratory of our system of dual sovereignty of state and nation; it does not operate as a limitation upon the powers, express or implied, of the national government. *United States* v. *Darby,* 312 U. S. 100, 123–124. In order for that provision to be at all germane it is necessary to find that Congress has attempted to exercise a power not committed to it.

The materials earlier referred to herein, *supra,* pp. 13–17, should, however, dispel conclusively any notion that the 1942 amendments represent a deliberate intrusion by Congress into a sphere reserved for the states. It cannot properly be said that there has been even an unintentional interference with the power of the states to regulate marital property rights in whatever manner they choose. The powers of the husband and the rights of the wife remain those which the state law ordains. Congress has done no more than, taking those rights as the state has distributed them, to levy its taxes in recognition of the fact that they have been so distributed. The power of

the state to regulate the marital property relationship is not impaired any more than its power to regulate the devolution of property is impaired by the estate tax in general. We think therefore that it cannot be said that the 1942 amendments derogate in any sense from the power of the state or from the rights of the individuals as the state has conferred them.

We note, however, that it has been asserted that the amendments will necessarily result in the abandonment in this country of the community property system. This is pure conjecture. There is not only no substantial basis for the claim that the community property states will be at a disadvantage taxwise, but there is no reason to assume that any such disadvantage would result in the abandonment of that system. The teachings of our history are to the contrary. The existence of tax disadvantages in the common law states following the decision in *Poe* v. *Seaborn*, 282 U. S. 101, did not cause them to adopt the community property system,[56] and there is no more reason to expect that the community prop-

[56] The only instances of such a change have been the adoption by Oklahoma in 1939 of an elective community property law, and by Oregon in 1943 of a similar law. After the decision in *Commissioner* v. *Harmon*, 323 U. S. 44, that such an elective law did not affect the incidence of the federal income tax, Oklahoma adopted a new law which does not contain the elective feature (Act of April 28, 1945) and the Oregon statute was repealed entirely (Act of March 20, 1945).

erty states would now adopt the common law system.

We do not believe therefore that the case presents in any sense a collision between state and federal power, but even if that should be thought to be an issue here, the answer is plain. The framers anticipated and provided the answer for such questions in the supremacy clause of the Constitution, "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield". *Florida* v. *Mellon*, 273 U. S. 12, 17; *Sonzinsky* v. *United States*, 300 U. S. 506, 514.

CONCLUSION

The judgment of the court below is erroneous and should be reversed.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
HELEN R. CARLOSS,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

OCTOBER 1945.

APPENDIX A

Constitution of the United States:

Article 1

Section 2.

* * * * *

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, * * *

* * * * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

Section 9.

* * * * *

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Internal Revenue Code:

Sec. 811. Gross estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the

decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof

"(e) *Joint and Community Interests.*—

"(1) *Joint Interests.*—"

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

* * * * *

(26 U. S. C. 1940 ed., Supp. IV, Sec. 811.)

Sec. 404. Proceeds of life insurance.

(a) *General Rule.*—Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) *Proceeds of Life Insurance.*—

"(1) *Receivable by the Executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

"(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under

policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purpose of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

*   *   *   *   *

"(4) *Community property.*—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

(26 U. S. C. 1940 ed., Supp. IV, Sec. 811.)

SEC. 411. LIABILITY OF CERTAIN TRANSFEREES.

(a) *Imposition of Liability.*—Section 827 (b) is amended to read as follows:

"(b) *Liability of Transferee, Etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth."

(b) *Definition of Transferee.*—Section 900 (e) is amended to read as follows:

"(e) *Definition of 'Transferee'.*—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, and includes a person who, under section

827 (b), is personally liable for any part of the tax."

(26 U. S. C. 1940 ed., Supp. IV, Sec. 827.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.41 [as amended by T. D. 5408, 1944 Cum. Bull. 578] *Deduction of the value of transfers previously taxed.*—If there is included in the decedent's gross estate property received by him by gift from any person, within five years prior to his death, or received by gift, bequest, devise, or inheritance from any person who died within five years prior to his death, or property acquired in exchange for property so received, the Internal Revenue Code authorizes a deduction in respect thereof, subject to the following conditions and limitations, namely:

(a) *Conditions.*—

(1) The property respecting which the deduction is sought must have been received by the decedent as a gift within five years prior to his death, or received by him by gift, bequest, devise, or inheritance from a prior decedent who died within five years of the decedent's death. Notwithstanding the designation by local law of the capacity in which the decedent takes, for the purposes of this deduction, property received by gift, bequest, devise or inheritance includes property, or rights with respect to property, held by or devolving upon the decedent as spouse under dower or curtesy laws or laws creating an estate in lieu of dower or curtesy, as spouse under community property laws, as tenant of a

tenancy by the entirety or joint tenancy with survivorship rights, as donee (possessor) of a power of appointment, as appointee under the exercise of a power of appointment, as remainderman under the release or nonexercise of a power of appointment, or as beneficiary of life insurance.

T. D. 5239, 1943 Cum. Bull. 1081:

In order to conform Regulations 105 [Part 81, Title 26, Code of Federal Regulations, 1942 Sup.] to certain sections of the Revenue Act of 1942 (Public law 753, Seventy-seventh Congress), approved October 21, 1942, and to the Joint Resolution of December 17, 1942 (Public law 809, Seventy-seventh Congress), such regulations are amended as follows:

*   *   *   *   *

PAR. 14. Section 81.23 is amended to read as follows:

SEC. 81.23. Community Property.—In the case of estates of decedents dying after October 21, 1942, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. Section 811 (e) (2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject

to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes any property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

* * * * *

PAR. 19. Section 81.27 is amended to read as follows:

SEC. 81.27. *Insurance Receivable by Other Beneficiaries.*—(a) *In case of decedent dying after October 21, 1942.*—

* * * * *

For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the

decedent's spouse or derived originally from such compensation or from separate property of such spouse. With respect to the meaning of property derived originally from such compensation or from separate property of the decedent's spouse, referred to in the preceding sentence, and to the identification required, see section 81.23.

APPENDIX B

H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35–37, 160 (1942–2 Cum. Bull. 372, 401):

* * * * *

3. Community Interests

For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband. The difference in the amount of the Federal estate tax is enormous as shown by the following tables:

* * * * *

It will be noted from the above table that in some instances there is an entire exemption from the Federal estate tax for the reason that the omission of one-half of the community property reduces the husband's net estate below the minimum exemption of $40,000. Moreover, this halving of community property greatly reduces the estate tax because of the progressive rates. For example, under the present law, a net estate of $50,000 will pay an estate tax of $500 in a non-community-property State

and no tax in a community-property State. An estate of $100,000 will pay a tax of $9,500 on the death of the husband in a non-community-property State and a tax of $500 on the death of the husband in a community-property State.

If the wife dies within 5 years of her husband, the remaining $50,000 upon which the husband paid no estate tax will be subject to an estate tax of $500. Thus, the total tax paid on this $100,000 estate in the community-property State will be $1,000 as compared with $9,500 in the non-community-property State or a tax saving of $8,500. In the case of a $5,000,000 estate, the tax saving in a community-property State will amount to as much as $485,800 and in the case of a $10,000,000 estate, the tax saving in a community-property State will amount to as much as $1,171,800.

Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law. The existing statute has been upheld by the Supreme Court in numerous cases.

* * * * *

SECTION 402. COMMUNITY INTERESTS.

This section eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811 (e) of the Internal Revenue

Code. A new paragraph (2) is added after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. The amendment thus makes due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor, subject, however, to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of appor-

tionment. State presumptions are therefore not operative against the Commissioner.

* * * * *

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231–232 (1942–2 Cum. Bull. 504):

SECTION 402. COMMUNITY INTERESTS.

This section, which corresponds to section 402 of the bill passed by the House, eliminates special estate tax privileges enjoyed by virtue of the community property system. The corresponding section of the House bill amended only section 811 (e) of the Code, relating to joint interests. Your committee bill adds an amendment to section 811 (d) relating to revocable transfers. A new paragraph (5) is added to section 811 (d), providing that for the purposes of section 811 (c) and (d), a transfer of property held as community property by the decedent and surviving spouse shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. A new paragraph (2) is added to section 811 (e) after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Such paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving

spouse or derived originally from such compensation or from separate property of the surviving spouse.

The amendments thus make due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor. Section 811 (e) (2), however, is subject to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

APPENDIX C

Louisiana Civil Code (Dart, Second Ed.), Vol. 1:

Art. 150. *Fraudulent debts and conveyances of husband.*—From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

* * * * *

Art. 1493. *Disposable portion—Legitimate children left surviving.*—Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number.

Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

Art. 1494. *Disposable portion—Parent or parents surviving.*—Donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leave a father, mother or both.

Art. 1495. *Forced heirs defined—Disinheritance.*—In the cases prescribed by the

two last preceding articles, the heirs are called forced heirs, because the donor can not deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.

* * * * *

ART. 1621. *Children—Disinheritance—Grounds.*—The just causes for which parents may disinherit their children are ten in number, to-wit:

1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.
2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.
3. If the child has attempted to take the life of either parent.
4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents.

ART. 1622. *Descendants — Ascendant's right to disinherit.*—The ascendants may

disinherit their legitimate descendants, coming to their succession, for the first nine causes expressed in the preceding article, when the acts of ingratitude there mentioned have been committed towards them, instead of towards their parents; but they cannot disinherit their descendants for the last cause.

ART. 1623. *Parents — Disinheritance by children—Grounds.*—Legitimate children, dying without issue, and leaving a parent, can not disinherit him or her, unless for the seven following causes, to-wit:

1. If the parent has accused the child of a capital crime, except, however, the crime of high treason;

2. If the parent has attempted to take the child's life;

3. If the parent has, by any violence or force, hindered the child from making a will;

4. If the parent has refused sustenance to the child in necessity, having the means of affording it;

5. If the parent has neglected to take care of the child while in a state of insanity;

6. If the parent has neglected to ransom the child when in captivity;

7. If the father or mother have attempted the life, the one of the other, in which case the child or descendant making a will may disinherit the one who has attempted the life of the other.

* * * * *

Louisiana Civil Code (Dart, Second Ed.), Vol. 2:

ART. 2332. *Community of acquets or gains—Modification or abrogation by agreement.*—The partnership, or community of acquets or gains, needs not to be stipulated;

it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

* * * * *

ART. 2334. *Separate and common property of spouses.*—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it can not be mortgaged or sold by the husband without her written authority or consent. [As amended, Acts 1912, No. 170; 1920, No. 186.]

ART. 2335. *Separate property of wife*—

Dotal and paraphernal property.—The separate property of the wife is divided into dotal and extradotal.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment.

Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry.

ART. 2337. *Dowry—Meaning of term.*—By dowry is meant the effects which the wife brings to the husband to support the expenses of marriage.

* * * * *

ART. 2347. *Husband-Rights in dowry.*—The dowry is given to the husband for him to enjoy the same as long as the marriage shall last.

* * * * *

ART. 2349. *Income property of husband—Use—Purposes.*—The income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper.

ART. 2350. *Administration of dowry by husband—Powers.*—The husband alone has the administration of the dowry, and his wife cannot deprive him of it; he may act alone in a court of justice for the preservation or recovery of the dowry, against such as either owe or detain the same, but this does not prevent the wife from remaining the owner of the effects which she brought as her dowry.

* * * * *

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ART. 2354. *Dowry consisting of movable effects—Ownership—Liability of husband.*—If the dowry, or part of it, should consist in movable effects, valued by the marriage contract without declaring that the estimated value of the same does not constitute a sale, the husband becomes the owner of such movable effects and owes nothing but the estimated value of the same.

* * * * *

ART. 2367. *Dissolution of marriage—Restoration of dotal property—Movables—Wife not divested of title.*—If the dowry consists of immovables, or if it consists of movables not valued by the marriage contract, or valued with the declaration that the valuation is not intended to divest the wife of her property in the same, the husband or his heirs may be compelled to restore the same without delay, after the dissolution of marriage.

* * * * *

ART. 2376. *Legal mortgage and privilege of wife—Movables and immovables.*—The wife has a legal mortgage on the immovables, and a privilege on the movables of her husband, to-wit:

1. For the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the marriage.

2. For the restitution or the replacing of the dotal effects, which she acquired during the marriage, either by succession or by donation; from the day when such succession devolved to her, or such donation began to have its effect.

* * * * *

ART. 2383. *Definition.*—All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal.

ART. 2384. *Wife's right to administer.*—The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

ART. 2385. *Wife failing to administer paraphernal property—Management by husband.*—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. *Fruits of paraphernal property—Ownership—Reservation by wife.*—The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by a written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a notary public and two witnesses and duly recorded in the conveyance records of the parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the

things which produce them. [As amended, Acts 1871, No. 87; 1944, No. 286, § 1.]

ART. 2387. *Wife—Assumption of administration of paraphernal property.*—The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

ART. 2388. *Husband administering paraphernal property—Accountability.*—The husband, who administers the paraphernal property of his wife, notwithstanding her formal opposition, is accountable to her for all the fruits, as well those existing as those which have been consumed.

* * * * *

ART. 2391. *Wife—Action for restitution of paraphernal effects.*—The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed.

ART. 2392. *Stipulation against marital partnership.*—Married persons may stipulate that there shall be no partnership between them.

* * * * *

ART. 2399. *Community of acquets and gains—Stipulation against required.*—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

* * * * *

ART. 2402. *Property forming community—Personal injuries to wife.*—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoy-

ment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." [As amended, Acts 1902, No. 68.]

ART. 2403. *Community and individual debts.*—In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404. *Husband master of community—Gratuitous and fraudulent conveyances.*—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos,*

by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. [As amended, Acts 1926, No. 96.]

ART. 2405. *Community presumed on dissolution of marriage.*—At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

ART. 2406. *Dissolution of marriage—Division of community.*—The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has

been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

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Art. 2408. *Increase or improvement of separate property during marriage—Division—Unearned increment—Separate property improved at expense of community.*—When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

Art. 2409. *Debts contracted during marriage—Liability.*—It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Art. 2410. *Wife or her heirs or assigns—Renunciation of community—Exoneration from debts.*—Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

Art. 2411. *Wife renouncing community—Effect.*—The wife, who renounces, loses

every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. *Wife—Active concern in community — Renunciation prohibited.* — The wife who has taken an active concern in the effects of the community, cannot renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. *Wife—Preservation of power to renounce — Inventory.* — The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

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ART. 2423. *Death of wife—Renunciation of community by heirs.*—In case of the dissolution of the marriage by the death of the wife, her heirs may renounce the partnership or community of gains, within the term and according to the forms which the law prescribes to the surviving wife.

ART. 2424. *Modification of legal community by contract.*—Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.

ART. 2425. *Wife's right to petition for separation of property.*—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to

the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

ART. 2426. *Dotal effects of wife—Failure of husband to reinvest.*—The neglect to reinvest the dotal effects of the wife, in cases where the law directs such reinvestment, is also sufficient cause for the wife to demand a separation of property.

ART. 2427. *Judicial decree essential.*—The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves.

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